UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES, SAN FRANCISCO OFFICE

CHANTICLEER HOLDINGS, INC. d/b/a
LITTLE BIG BURGER

and Case 19–CA–239759

LITTLE BIG BURGER, INDUSTRIAL
WORKERS OF THE WORLD

ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT'S PETITION TO REVOKE
SUBPOENA DUCES TECUM B-1-16XCLAD

The Respondent Company's October 28, 2019 petition to revoke General Counsel subpoena duces tecum B-1-16XCLAD is granted in part and denied in part.

The petition is granted to the extent it requests clarification of the first and second paragraphs of the subpoena.[1] With respect to the first paragraph, the Respondent must only produce a complete copy of alleged discriminatee Lazuli's personnel file and other files, paper and electronic, maintained under Lazuli's name (excluding medical records). Regarding the second paragraph, the Respondent must only produce the documents and communications it relied upon in terminating Lazuli, and the termination documents themselves.

The petition to revoke is otherwise denied. As discussed in the General Counsel's opposition, the subpoenaed documents appear reasonably relevant to the disputed issues in the case, i.e., they directly relate to the contested complaint allegations regarding Lazuli's termination and/or Respondent's defenses to those allegations, or they could provide background information or lead to other evidence potentially relevant to those allegations or defenses. See Sec. 102.31(b) of the Board's Rules; *Hyundai Motor Mfg. Alabama, LLC*, 366 NLRB No. 166, slip op. at n. 2 (2018); *McDonald's USA, LLC*, 363 NLRB No. 144, slip op. at 15 (2016); and *Perdue Farms v. NLRB*, 144 F.3d 830, 833–834 (D.C. Cir. 1998).

[1] The General Counsel's opposition essentially denies this request, stating that issues regarding the phrasing of the paragraphs and accompanying instructions "are properly explored when, and if, the custodian of records is called as a witness at hearing." However, such a response does not promote efficiency; rather, the better practice is to clarify or, if appropriate, modify the subpoena on request to facilitate the respondent's full and timely production of responsive documents at the outset of the hearing. Cf. *Starbucks Coffee Co*., 1–CA–177856, unpub. Board order issued May 19, 2017 (2017 WL 2241023), at 1 n. 1 (denying the employer's petition to revoke the Region's investigative subpoena in light of the Region's modification in its statement in opposition to the employer's petition). The requested clarification/modification will therefore be provided by this order, without prejudice to the General Counsel and the Respondent mutually agreeing to an additional or alternative clarification/modification.

Further, as indicated by the General Counsel, the 2-year period covered by the third and fourth paragraphs of the subpoena is neither unusual nor unreasonable given the complaint's retaliatory discharge allegations and the clear relevance of comparator/disparate-treatment evidence. See, e.g., *EEOC v. AutoZone, Inc.*, 258 F.Supp.2d 822, 831 (W.D. Tenn. 2003), and cases cited there. See also *Metro-West Ambulance Service,* 360 NLRB 1029, 1030 and n. 13 (2014). The Respondent's generalized assertions that locating and producing the requested documents over that time period would be unduly burdensome, without detailed facts and supporting affidavits describing the Company's file storage and retrieval practices and capabilities, are insufficient.[2] See *NLRB v. American Medical Response, Inc.,* 438 F.3d 188, 193 n. 4 (2d Cir. 2006); *NLRB v. Carolina Food Processors*, 81 F.3d 507, 509–514 (4th Cir. 1996); *NLRB v. G.H.R. Energy Corp*., 707 F.2d 110, 114 (5th Cir. 1982); and *NLRB v. AJD, Inc., a McDonald's Franchisee*, 2015 WL 7018351 (S.D.N.Y. Nov. 12, 2015).

The Respondent also asserts that, "even if [it] could undertake this review, any information that it found would not impact the knowledge of the decision-makers at the time [it] terminated Lazuli's employment." However, Respondent does not further explain this assertion or why it warrants revoking the subpoena. For example, Respondent does not explain who the decisionmakers were, whether they also participated in the decision to issue discipline to other employees during the previous 2 years at its Oregon stores,[3] and whether the disciplinary decisions were discretionary or mandated by the Respondent's established disciplinary policies and procedures.

Finally, the Respondent also objects to the General Counsel's additional request, in the cover letter accompanying the subpoena, for information regarding the methodology of Respondent's search for electronically stored information (ESI). However, the Board has rejected similar objections with respect to investigative subpoenas. See *Starbucks Coffee Co*., supra n. 1. There is no apparent reason why the General Counsel should not be afforded the same information on request along with any subpoenaed documents in response to a hearing subpoena.[4]

Dated, San Francisco, California, November 1, 2019

Jeffrey D. Wedekind
Administrative Law Judge

[2] Respondent's petition generally asserts that it does not have a dedicated staff to conduct reviews of its files; that high level executives would have to do it; that "the architecture of Respondent's computer systems . . . [would require] manually reviewing hundreds of files"; and that it would likely take "over 25 hours of key executive's time" to perform the review.

[3] Respondent's petition does not specifically object to the subpoena's third and fourth paragraphs to the extent they request prior disciplinary actions at any of Respondent's Oregon facilities, not just the particular Portland facility where Lazuli worked.

[4] Indeed, there are compelling reasons to permit this practice, as in most cases it would likely avoid the necessity of calling the custodian(s) of records or other witnesses to testify at the hearing regarding their search methodologies.

Served by email on the following:

Ryan Connolly, Esq.	Ryan.connolly@nlrb.gov
Dennis Westlind, Esq.	dwestlind@bullardlaw.com
Benjamin P. O'Glasser, Esq.	boglasser@bullardlaw.com
Little Big Union, IWW	together@littlebigunion.org